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COURT OF CRIMINAL APPEALS
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No. PD-0776-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
10/24/2019
DEANA WILLIAMSON, CLERK

SAMUEL UKWUACHU, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from McLennan County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Samuel Ukwuachu.

*The case was tried before the Honorable Matt Johnson, 54th District Court, McLennan County, Texas.

*Counsel for Appellant at trial was Jonathon P. Sibley, 801 Washington Avenue, Suite 300, Waco, Texas 76710.

*Counsel for Appellant on appeal is William A. Bratton, III, 2828 Routh Street, Suite 675, Dallas, Texas 75201.

*Counsel for the State at trial were Hilary LaBorde and Robert Moody, Assistant Criminal District Attorneys, 219 North 6th Street, Suite 200, Waco, Texas 76701.

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No. PD-0776-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

SAMUEL UKWUACHU, Appellant

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* * * * *

STATE'S BRIEF ON THE MERITS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State should avoid leaving a false or misleading impression through its questions and argument. Courts of appeals should take these claims seriously. But they should not ignore basic rules of appellate procedure to do so, or grant relief on claims that have no basis in fact.

STATEMENT OF THE CASE

Appellant was convicted of sexual assault.[1] On appeal, appellant alleged that the State's use of unadmitted phone records during cross-examination of two witnesses and in closing argument left a false impression with the jury because the

[1] 1 CR 641.

accuracy of the phone records was never verified.[2] He conceded that this claim was not preserved at trial.[3] The court of appeals reversed without addressing preservation or explaining how appellant satisfied his burden without credible evidence the phone records were inaccurate.[4]

STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument.

ISSUES PRESENTED

Can you have a "false testimony" claim without testimony or falsity?

STATEMENT OF FACTS

A. The State received and disclosed a defense witness's phone records.

On the second day of trial, the State received phone records for appellant's roommate, Peni Tagive, who was to be a key witness for appellant.[5] The State informed defense counsel that: 1) the State's designated expert plotted Tagive's movements based on the phone records;[6] 2) the records contradicted Tagive's relevant

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[2] App. Amended Br. on Remand Points of Error I and II (same argument for their use during the testimony of two witnesses).

[3] App. Amended Br. on Remand at 26-28, 37-39.

[4] *Ukwuachu v. State*, No. 10-15-00376-CR, 2019 WL 3047342, at *3 (Tex. App.—Waco July 10, 2019, pet. granted) (not designated for publication).

[5] 10 RR 14. Appellant's defense was that his conduct was consensual; Tagive was expected to (and did) testify that he was home at the time and did not hear any struggle.

[6] 10 RR 60.

testimony to the grand jury;[7] and 3) as a result, Tagive's attorney had indicated that Tagive might invoke his Fifth Amendment right and not testify at appellant's trial.[8]

All of this was news to defense counsel, who requested the remainder of the day to review the records and consult with Tagive and Tagive's attorney.[9] Counsel emphasized the "specific scientific evidence" contained in the record (*i.e.*, the cell tower location information), the need for his own evaluation to rebut the State's expert, and the need to speak with Tagive about them.[10] The trial court granted the request.[11]

B. Appellant objected to admission of the phone records.

The next morning, appellant filed a motion in limine and made in-court objections to the admission of the phone records.[12] His procedural objection was that the business records affidavit was not timely filed and the State had no witness to authenticate the records.[13] His substantive objection was that "the claims made by the state . . . that the records proved inaccuracies in [Tagive's] previous testimony . . .

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[7] 10 RR 14, 59.

[8] 10 RR 14.

[9] 10 RR 15, 62-64.

[10] 10 RR 57-58, 60-63.

[11] 10 RR 65-66.

[12] 1 CR 585 (motion in limine).

[13] 11 RR 7-8; 1 CR 585. *See* TEX. R. EVID. 902(1)(A) (affidavit sufficient if served at least 14 days before trial).

were completely false and based on inaccurate reading and/or understanding of the time zones on the records."[14] Appellant's motion in limine asked that the State be made to approach before mentioning the records.[15]

The State acknowledged the time zone difference, maintained the records conflicted with Tagive's grand jury testimony, and insisted it had a good faith reason to question Tagive about it.[16] The trial court ruled that the records would not be admitted without a sponsor due to the timing but added the State could "[a]bsolutely" ask Tagive about making phone calls.[17]

The phone records were not offered or admitted for record purposes.

C. The State used the unadmitted phone records.

The State used the phone records during its cross-examination of Tagive and Morgan Reed,[18] the young lady who claimed to have dropped Tagive off at the

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[14] 1 CR 585. Counsel claimed the State's "time zones . . . were five hours off." 11 RR 8.

[15] 11 RR 7; 5 CR 585.

[16] 11 RR 8.

[17] 11 RR 9. It is not clear that this was a denial of appellant's motion in limine.

[18] 11 RR 30 ("Can you tell this jury why your phone records show he called you at one o'clock from across town from his apartment?"), 31 ("Okay. Ma'am, he made calls at one o'clock from across town. Would you like to tell this jury why that doesn't match up with your statement?"), 31-32 ("Well, no. You're calling him at 12:30 as well. Why are you still calling him at 1:00?"), 32 ("No. I'm looking at calls between you and [Tagive]."), 32 ("You told this jury you were out of there by 1:00 to 1:30. Why is he still calling you?"), 32 ("It doesn't match the facts.").

apartment.[19] Only two objections were made. The basis of the first objection and ruling occur off-record, but the question was essentially repeated without objection.[20] The second objection was to a misstatement of Reed's testimony.[21] No relevant objections were made during Tagive's cross-examination.

Reed ultimately agreed that she could not remember the exact times.[22] She assured the jury she was telling the truth.[23] When Tagive was told his records showed he made two calls after he claimed he got home—one while out at 1:00 a.m.—he agreed without qualification.[24] Tagive also assured the jury he was telling the truth.[25]

During closing argument, the State characterized Tagive's testimony about his presence in the apartment as "all fuzzy" now that "we have his phone records."[26] Defense counsel countered that specific times did not matter; the important thing is

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[19] 11 RR 60 ("You know your phone records show you were across town at one o'clock in the morning and you were making calls to Morgan at one o'clock in the morning."), 60 ("Okay. You know your phone call -- phone calls -- records also show you were making a call around 2:00 in the morning."), 62 ("What did you call him for about eleven o'clock in the morning from your apartment?").

[20] 11 RR 30 ("Can you tell this jury why your phone records show he called you at one o'clock from across town from his apartment?").

[21] 11 RR 31.

[22] 11 RR 34-35.

[23] 11 RR 34.

[24] 11 RR 60-61. This conflicted with his previous trial testimony and apparently his grand jury testimony. 11 RR 46-47, 60.

[25] 11 RR 70.

[26] 11 RR 197.

that Tagive was in the apartment before appellant got home.[27] The State rebutted that argument, saying the inconsistency in Tagive's testimony on his time of arrival at home "absolutely does [matter] because he's also all over the city when he's making the calls."[28] Appellant did not object to a misstatement of the evidence, "facts not in evidence," or any form of falsity.

D. Appellant's motion for new trial.

Appellant's motion for new trial alleged numerous grounds, including that "[t]he use of the [phone] records [during Tagive's cross-examination] created a false image to the jury that was reckless on the part of the State."[29] Appellant did not allege that the State had elicited false testimony. Rather, Tagive, in an affidavit attached to the motion, said that he testified truthfully at trial but that he "had no answer to the allegations made" by the prosecutor based on the phone records.[30]

Nor did appellant allege that the phone records were actually false. His expert, in an affidavit, claimed that the times on the records were 6 hours off—not the 5 believed by trial counsel—due to daylight savings time.[31] As for location, appellant's

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[27] 11 RR 209.

[28] 11 RR 219. *See also* 11 RR 221 ("He had a story that he was confident about, that he was at home in bed by 12:30. And here we are making calls all over town afterwords (sic).").

[29] 1 CR 653.

[30] 1 CR 660.

[31] 1 CR 662.

expert claimed that "longitude and latitude figures provided on the mobility usage, in my experience, are rarely accurate."[32] According to him, "it would take an expert to spend (sic) a number of hours to evaluate the records and cell tower locations in order to make a final determination of whether the longitude and latitude listed is accurate."[33] Short of that, in his opinion, "any use of those records would be reckless and without any factual basis."[34] He did not evaluate the records.

At the hearing, appellate counsel clarified that his claim was the records were used without an expert to demonstrate their accuracy.[35] The State argued that the existence of the conversations indicated by the phone records was essentially authenticated by Tagive's admissions.[36] The State also pointed out that the defense was aware of the time variation before Tagive testified.[37] And, although it argued that accuracy was irrelevant because the records were not admitted into evidence, it maintained that "[n]o incorrect times were given before the jury."[38]

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[32] 1 CR 662.

[33] 1 CR 662.

[34] 1 CR 662.

[35] 14 RR 23.

[36] 14 RR 24-25.

[37] 14 RR 25.

[38] 14 RR 25. Again, the trial court was made aware when the phone records were offered that the State's expert had reviewed them.

The motion for new trial was denied without comment or findings.[39]

E. Appellant's argument on appeal.

Appellant claimed on appeal that the use of the phone records during cross-examination of Reed and Tagive violated appellant's due process rights.[40] He said it "created a false impression" that Tagive was not in his apartment.[41] The framework urged was that for false evidence material to the jury's verdict of guilt.[42] He argued that contemporaneous objection was excused.[43] Appellant claimed he was harmed because "[t]he prosecution used the records as if they proved that Mr. Tagive was not in his apartment at the time he was calling Ms. Reed" and the phone records "were never sponsored into evidence nor explained by a person qualified to interpret the records."[44]

SUMMARY OF THE ARGUMENT

This Court could remand for the court of appeals to determine what kind of due process claim was made so that the proper standard of review could be ascertained. This Court could also remand for consideration of preservation, a threshold issue that

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[39] 14 RR 29.

[40] App. Amended Br. on Remand at 20, 31.

[41] App. Amended Br. on Remand at 20-21, 31-32.

[42] App. Amended Br. on Remand at 25, 36.

[43] App. Amended Br. on Remand at 28, 39.

[44] App. Amended Br. on Remand at 29, 40.

was overlooked despite appellant's concession. But this Court should apply a basic rule of review for the denial of motions for new trial and hold that, regardless of whether appellant articulated a claim that may be raised for the first time on appeal, he cannot win a "falsity" claim without any evidence of falsity.

ARGUMENT

I. What claim did the court of appeals decide?

Appellant argued on appeal that he would be entitled to relief if he "show[ed] that (1) false evidence was presented at his trial and (2) the false evidence was material to the jury's verdict of guilt."[45] He cited classic "false testimony" cases like *Ex parte Weinstein*, *Ex parte Chavez*, and *Ex parte Ghahremani*.[46] The court of appeals purported to review the claim as an alleged due-process violation for the use of material, false testimony.[47] But that test was never applied.

Instead, appellant's ultimate claim was that by "us[ing] the records as if they proved that Mr. Tagive was not in his apartment at the time he was calling Ms. Reed[,]" the State "creat[ed] a false picture to the jury based on a completely

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[45] App. Amended Br. on Remand at 25, 36.

[46] App. Amended Br. on Remand at 25, 36. *See Ex parte Weinstein*, 421 S.W.3d 656 (Tex. Crim. App. 2014); *Ex parte Chavez*, 371 S.W.3d 200 (Tex. Crim. App. 2012); *Ex parte Ghahremani*, 332 S.W.3d 470 (Tex. Crim. App. 2011).

[47] *Ukwuachu*, 2019 WL 3047342, at *2 (citing *Weinstein* and *Chavez*).

unsupported claim."[48] The court of appeals similarly concluded that "the State's repeated references to what the cell phone records showed, including the location and time of calls made, without their admission into evidence created a false impression with the jury."[49] Both appear to agree that this is not a false evidence case because both said the failure to admit the records—to make them evidence—is a problem. As four members of this Court recently said, one cannot have a "false-evidence" case if the subject matter was not introduced at trial.[50] "That should be the end of the analysis."[51]

But it wasn't. Did appellant allege—and the court of appeals decide—some "pseudo false-evidence" claim[52] based on the leaving of a false impression through questions or argument? A "false impression," in the due process context, is the *result* of the admission of false or misleading evidence.[53] It is the harm to be avoided. Is

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[48] App. Amended Br. on Remand 29, 40.

[49] *Ukwuachu*, 2019 WL 3047342, at *3.

[50] *Ex parte Storey*, __ S.W.3d __, WR-75,828-02, 2019 WL 4866006, at *3 (Tex. Crim. App. Oct. 2, 2019) (Hervey, J., concurring).

[51] *Id*.

[52] *Id*. at *4.

[53] *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015) ("In determining whether a particular piece of evidence has been demonstrated to be false, this Court has explained that the relevant question is whether the testimony, taken as a whole, gives the jury a false impression."); *Ex parte Weinstein*, 421 S.W.3d at 666 ("The proper question in a false-testimony claim is whether the particular testimony, taken as a whole, 'gives the jury a false impression.'") (quoting *Ex parte Chavez*, 371 S.W.3d at 208); *Ex parte Ghahremani*, 332 S.W.3d at 477 ("A conviction procured (continued...)

there such thing as a stand-alone "false impression" claim that can be based on a prosecutor's questions, comments, or argument, none of which are testimony or evidence?

Worse, it is not clear that the court of appeals has concluded that the jury was misled about a fact. The "false impression" the court identifies is that the State referenced the phone records "in a manner that indicated that the records definitively showed [Tagive]'s location at certain critical times when they did not."[54] This can be read to say the records do not show his location but that conclusion is impossible to draw; the phone records were not admitted even for record purposes. The more likely, and more worrisome, interpretation is that the State misled the jury by appearing more confident than it should have been about records that *might* be inaccurate. Did the State lose a "possibly unjustified confidence" claim?

Or is all of this merely a gussied-up complaint about improper questions and argument? What is clear is that the court of appeals did not apply the "false evidence" test it said it would. Litigants (and courts) should distinguish among claims and use the appropriate tests because those tests matter.[55] The court of

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[53](...continued)
through the use of false testimony is a denial of the due process guaranteed by the Federal Constitution.").

[54] *Ukwuachu*, 2019 WL 3047342, at *3.

[55] *See Ex parte Storey*, 2019 WL 4866006, at *3-4 (Hervey, J., concurring) (distinguishing "false evidence" claims from the more general claim of a Due Process violation stemming from (continued...)

appeals's failure on this point warrants reversal but, as shown below, there are larger problems with the court's opinion.

II. Appellant did not preserve anything resembling a "false testimony" claim.

Preservation is a threshold issue a court of appeals must take up even if the parties do not.[56] In this case, appellant conceded that he did not preserve whatever claim he made on appeal,[57] but the court of appeals did not address it. It should have; there were no relevant trial objections and appellant's motion for new trial did not raise anything that could not have been discovered through due diligence.

A. There were no trial objections to the State's use of phone records.

Appellant's motion in limine asked that the State be made to approach before mentioning the records, but that does not preserve error.[58] He did not object preemptively to the State's "use" of the phone records, only their admission. He did not object to individual questions that referred to the records, or ask that the jury be instructed to disregard them or the answers. Nor did he object to the State's reference to or characterization of the relevant testimony during closing arguments.

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[55](...continued)
improper prosecutorial comments or conduct).

[56] *Mays v. State*, 285 S.W.3d 884, 889 (Tex. Crim. App. 2009).

[57] App. Amended Br. on Remand at 28, 39.

[58] 11 RR 7; 5 CR 585. *See Gonzales v. State*, 685 S.W.2d 47, 50 (Tex. Crim. App. 1985) ("For error to be preserved with regard to the subject matter of the motion in limine it is absolutely necessary that an objection be made at the time when the subject is raised during the trial.").

B. Appellant's motion for new trial was insufficient to preserve his complaint.

Although a trial judge may grant a motion for new trial on the basis of unpreserved trial error, the denial of that motion usually means the defendant must satisfy preservation requirements to prevail on appeal.[59] However, a motion for new trial may be used to raise belated trial complaints when the defendant had no opportunity to object[60] or the complaint is based on material evidence that could not have been discovered by due diligence.[61]

This is not one of those cases. Even if the differences between how he framed his complaint in the motion and on appeal are ignored, appellant was or should have been aware of the basis for his ultimate appellate complaints during trial. At least as it pertained to the times in the phone records, appellant identified what he believed to be a time-zone discrepancy before Tagive and Reed took the stand. The same is true for the location information; appellant spotted the issue and received time to review the records' "specific scientific details" before they were used. Appellant never asked for additional time to get an expert. Nothing in his motion for new trial could not have been raised during trial.

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[59] *State v. Herndon*, 215 S.W.3d 901, 909-10 (Tex. Crim. App. 2007).

[60] *Burt v. State*, 396 S.W.3d 574, 577 (Tex. Crim. App. 2013).

[61] *State v. Arizmendi*, 519 S.W.3d 143, 148-49 (Tex. Crim. App. 2017); TEX. CODE CRIM. PROC. art. 40.001.

C. No one has articulated a preservation exception for allegedly inaccurate questions and comments.

If appellant's claim is actually one of improper questions or closing argument, it was forfeited by inaction at trial.[62] If there is an exception for "false impression" claims, the court of appeals never said so and appellant inadequately explained to that court why it must be so.[63] This Court often remands for consideration of this threshold issue but, as shown below, it would be a waste of judicial resources.

III. There is no evidence the State said or did anything false or misleading.

This Court can avoid argument over the creation of new due process claims or an exemption from established preservation law by holding that a reviewable "falsity" claim of any type requires falsity. Neither appellant nor the court of appeals identified proof of falsity because, as a matter of fact and of appellate convention,

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[62] *Roberts v. State*, 220 S.W.3d 521, 533 (Tex. Crim. App. 2007) (improper suggestions through cross-examination) (citing TEX. R. APP. P. 33.1(a)(1)); *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007) ("To preserve error in prosecutorial argument, a defendant must pursue to an adverse ruling his objections to jury argument."). Even if anything the State said is equated to "false evidence," complaints about the admission of evidence are also forfeitable. *Saldano v. State*, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002) (even "constitutional" admissibility complaints are forfeitable).

[63] Appellant's argument for why his claim was not forfeitable was:

> It is widely considered to be fundamental to the proper functioning of our adjudicatory process that the prosecution not create a false impression to the jury. The Constitution requires introduction of only otherwise relevant and admissible evidence. *Hale v. State*, 140 S.W.3d 381, 396 (Tex.App.—Fort Worth 2004, pet. ref'd).

App. Amended Br. on Remand at 28, 39. In *Hale*, the court of appeals held the defendant was not entitled to introduce evidence of the victim's alleged sexual behavior because he failed to satisfy the requirements of Rule 412. The court of appeals concluded that "[t]he Constitution requires . . . only the introduction of otherwise relevant and admissible evidence"; the failure to satisfy Rule 412 meant the proffered evidence was not relevant or admissible. *Hale*, 140 S.W.3d at 396-97.

there is none.

Factually, appellant's expert did not say that the times or location information contained in the phone records are inherently inaccurate. Rather, he said time zone adjustments were necessary and that the location information has a potential for error that requires review by an expert before use. He did not perform this review and compare it to the State's assertions or Tagive's and Reed's testimony at trial. In effect, all he said was the records *could be* inaccurate. That is not the same as "false or misleading."

Legally, even if appellant's expert had sworn that the records were wholly inaccurate or blatant forgeries, the trial court had discretion not to believe him.[64] Even if the trial court found his affidavit to be credible generally, it could have accepted the State's assertion that its investigator, a designated expert, had performed the review recommended by appellant's expert.

Either way, appellant had no leg to stand on. This is the brief analysis that should have happened on the way to rejecting appellant's point of error (assuming categorization and preservation *arguendo*). "An appellate court reviews a trial court's

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[64] *See Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012), *overruled on other grounds by Miller v. State*, 548 S.W.3d 497 (Tex. Crim. App. 2018) ("The trial court is free to disbelieve an affidavit, especially one unsupported by live testimony.").

denial of a motion for new trial for an abuse of discretion,"[65] and either of the above conclusions would have been within the trial court's discretion. It is possible this was overlooked because appellant did not try to base his appellate complaint on his motion for new trial—a problem in itself. But, however it is framed, a court of appeals cannot grant relief on testimony the trial court is presumed to have rejected, especially when that testimony does not assert the very thing required for relief.

IV. Conclusion

This Court could remand for the court of appeals to decide in the first instance whether whatever claim appellant raised on appeal may be raised for the first time on appeal. But that is unnecessary in this case because no "falsity" claim that could arise out of the State's use of the phone records can succeed.

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[65] *Burch v. State*, 541 S.W.3d 816, 820 (Tex. Crim. App. 2017). The only exception is for jury-charge error raised in a motion for new trial, as "[a] statute [like TEX. CODE CRIM. PROC. art. 36.19] cannot be superceded by a rule." *Igo v. State*, 210 S.W.3d 645, 647 (Tex. Crim. App. 2006).

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and remand for consideration of the remaining issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,817 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of October, 2019, a true and correct copy of the State's Brief on the Merits has been eFiled or e-mailed to the following:

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